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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. ~~814~~ 80

PAN AMERICAN PETROLEUM CORPORATION, a Delaware Corporation, *Petitioner*,

v.

THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY, and THE HONORABLE ANDREW D. CHRISTIE, sitting as a Judge of that Court, and CITIES SERVICE GAS COMPANY, a Delaware Corporation, *Respondents*.

No. ~~815~~ 81

TEXACO INC., a Delaware Corporation, *Petitioner*,

v.

THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY, and THE HONORABLE ANDREW D. CHRISTIE, sitting as a Judge of that Court, Respondents, and CITIES SERVICE GAS COMPANY, a Delaware Corporation, *Intervening Respondent*.

No. ~~816~~ 82

COLUMBIAN FUEL CORPORATION, *Petitioner*,

v.

THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY, and THE HONORABLE ANDREW D. CHRISTIE, sitting as a Judge of that Court, and CITIES SERVICE GAS COMPANY, *Respondents*.

On Petitions for a Writ of Certiorari to the Supreme Court of the State of Delaware

BRIEF OF CITIES SERVICE GAS COMPANY IN OPPOSITION

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May 31, 1960

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CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 914

PAN AMERICAN PETROLEUM CORPORATION, a Delaware Corporation, *Petitioner*,

v.

THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY, and THE HONORABLE ANDREW D. CHRISTIE, sitting as a Judge of that Court, and CITIES SERVICE GAS COMPANY, a Delaware Corporation, *Respondents*.

No. 915

TEXACO INC., a Delaware Corporation, *Petitioner*,

v.

THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY, and THE HONORABLE ANDREW D. CHRISTIE, sitting as a Judge of that Court, Respondents, and CITIES SERVICE GAS COMPANY, a Delaware Corporation, *Intervening Respondent*.

No. 916

COLUMBIAN FUEL CORPORATION, *Petitioner*,

v.

THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY, and THE HONORABLE ANDREW D. CHRISTIE, sitting as a Judge of that Court, and CITIES SERVICE GAS COMPANY, *Respondents*.

On Petitions for a Writ of Certiorari to the Supreme Court of the State of Delaware

BRIEF OF CITIES SERVICE GAS COMPANY IN OPPOSITION

OPINION BELOW

The opinion of the Superior Court of Delaware in and for New Castle County in Civil Action Nos. 670, 671 and 708 (1958) is reported at 155 A. 2d 879 (Pan American Appendix, pp. 1a-15a). The opinion of the Supreme Court of Delaware is reported at 158 A. 2d 478 (Pan American Appendix pp. 16a-30a).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petitions.

QUESTION PRESENTED

Whether Section 22 of the Natural Gas Act ousts State courts of their jurisdiction to entertain common law actions for recovery or restitution of payments made for gas in excess of the agreed-upon contract prices simply because such contracts were filed as rate schedules with the Federal Power Commission.

STATUTE AND REGULATION INVOLVED

The provision of the federal statute involved is Section 22 of the Natural Gas Act, 52 Stat. 833 (1938), 15 U.S.C. 717 u (printed in Pan American Appendix, pp. 54a-55a). Sections 154.91 through 154.95 and Section 154.101 of the Federal Power Commission's Regulations under the Natural Gas Act (18 C.F.R. 154.92-154.95 and 154.101) are also involved. Sections 154.91 through 154.94 and Section 154.101 are printed at pp. 40a-46a of Columbian's Appendix. Section 154.95 provides as follows:

"154.95 *Oral Agreements.*

"'If any rate schedule or change in a rate schedule is not in writing, its terms shall be reduced to writing and filed with the Commission. If the parties are not able to agree to the precise terms within a reasonable time, the applicant shall file, in triplicate, a statement of his understanding of the agreement, serving a copy thereof on the other parties to the agreement. Such other parties, in the latter event, may subsequently file, in triplicate, their understanding of the agreement."

STATEMENT

These proceedings stem from the lengthy litigation commenced six years ago involving the validity of the Kansas minimum price order, which has already twice reached this Court. Since the instant cases (Nos. 914, 915 and 916) all seek certiorari to review the same judgment, and since the basic issue raised in the three cases is the same, this single Brief is filed in opposition to each of the three Petitions.

Cities Service Gas Company (Cities) and the Petitioners are all Delaware corporations. Cities is a natural gas pipeline company subject to the jurisdiction of the Federal Power Commission. Petitioners are producers of natural gas who are also subject to the jurisdiction of the Federal Power Commision. Cities purchases natural gas from Petitioners and others, and transports and sells such gas to local distributing companies for resale to the general public.

In 1949, 1950 and 1951, Cities entered into fixed price contracts with each of the Petitioners pursuant to which the Petitioners agreed to sell and Cities agreed to buy natural gas produced by Petitioners from the Hugoton Field of Kansas. In each case, the price agreed upon was less than 11¢ per thousand cubic feet at a pressure base of 14.65 psia.

On December 2, 1953, the Corporation Commission of the State of Kansas promulgated an order, effective January 1, 1954, fixing a minimum price of 11¢ per Mcf to be paid for natural gas produced from the Kansas Hugoton Field (Pan American Appendix p. 17a). The effect of this order was, of course, to require Cities to pay Petitioners higher prices than agreed upon in the respective contracts. Proceedings

were immediately instituted by Cities for judicial review of the order.

On January 21, 1954, before making any payments for gas purchased subsequent to the effective date of the Kansas minimum price order, Cities wrote a letter to each of the Petitioners relative to that order. After stating in the letter that Cities had filed suit to obtain judicial review of the order, Cities notified the Petitioners that it intended to pay for gas purchased from the Hugoton Field in strict compliance with the terms of the order; that such compliance, however, was being made to avoid the penalties provided by the Kansas statutes for violation; and that the payments to Petitioners, pending final judicial determination of the validity of the order, "are to be considered and accepted by you as involuntary payments on our part, without prejudice to our rights in said litigation, and in no event as an acquiescence by us in the validity of said order." The final paragraph of the letter stated:

> "In the event the said Order is finally judicially modified or declared to be invalid in whole or in part, as a result of which you have been overpaid for gas purchased during the interim aforesaid, Cities Service Gas Company will expect you to refund to it the amount of said overpayments". (Pan American Appendix p. 18a)

Thereafter, each monthly voucher check sent to each of the Petitioners for gas purchased by Cities bore the legend that the payment was made subject to the provisions of the January 21, 1954 letter. Each Petitioner accepted all such checks, cashed them and made no objection to the conditions upon which they were tendered. Indeed, Petitioner, Pan American (formerly Stanolind), by letter to Cities dated January 27, 1954, stated:

"We construe the last paragraph of said [January 21, 1954] letter to mean that Cities will expect Stanolind to refund to it the amount of overpayments, if any, without any interest thereon should the said Order of December 2, 1953 be finally judicially modified or declared to be invalid in whole or in part by an adjudication which would be binding and controlling on Stanolind. We will, therefore, accept payment on this basis".[1]

The impact of the Kansas minimum price order upon Cities together with other increased costs was such that it was compelled to file increased rates with the Federal Power Commission at Docket No. G-2410. After a five-month suspension period (except with respect to industrial rates), the increased rates were made effective September 23, 1954, subject to an undertaking to refund any amounts found unjustified, after hearing, by the Commission. On May 25, 1956, the Federal Power Commission entered its order approving a settlement of that case. By the terms of that order, Cities is required to refund to its jurisdictional customers, in accordance with the formula set forth in the order, the major portion of the money obtained by Cities as a result of the very litigation involved herein (See *In Re Cities Service Gas Company*, 15 F.P.C. 1448, 1453-58).

In the meantime, in order to give effect to this Court's decision in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954), the Federal Power Commission, on July 16, 1954, issued its Order No. 174 (later replaced or supplemented by Orders 174-A and 174-B) requiring producers, such as Petitioners, selling gas

[1] Civil Action No. 722, Superior Court of Delaware, Cities Service Gas Company v. Pan American Petroleum Corporation, Complaint p. 4.

in interstate commerce (theretofore not regulated by the Commission) to file their contracts in effect on June 7, 1954, as their rate schedules. "Rate schedule" was defined as "* * * the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954 * * *" (18 C.F.R. 154.93). The order did not require the filing of any "rate", nor did the order purport to determine the rates required to be paid for gas. It merely ordered the filing of the above-enumerated documents, which *documents* constituted the "rate schedule."

Petitioners filed their basic contracts and supplements thereto, the Kansas minimum price order, and a billing statement for a then current month, showing thereon the Kansas ordered minimum price. Petitioner, Texaco, also filed the aforementioned refund letter of January 21, 1954 (See p. 6 of Texaco's Petition herein).

Thereafter, the Secretary of the Commission, pursuant to an unpublished minute of the Commission directing such action, wrote a form letter to each of the Petitioners advising them that their tendered rate filings had been accepted for filing (Pan American Appendix pp. 61a-62a, 65a-68a). Cities was not notified of the entry of the minute. Nor was it served with copies of the Secretary's letters to Petitioners.

The Order 174 series of orders contained no provision requiring producers, such as Petitioners, to serve purchasers, such as Cities, with copies of the initial filings made pursuant to the orders. Nor did Order 174 make any provision for notification by the Commission to the purchasers of the acceptance of the producer filings. No provision for any hearing was contained in the order and none was held.

On January 20, 1958, this Court held, in the litigation referred to in the aforementioned letter of January 21, 1954, that the Kansas order was void. *Cities Service Gas Company* v. *State Corporation Commission*, 355 U.S. 391. Thereafter, the Supreme Court of Kansas held that the Kansas order had been void *ab initio* for lack of jurisdiction in the Kansas Corporation Commission to issue the order. *Cities Service Gas Company* v. *Kansas Corporation Commission*, 184 Kan. 540, 337 P. 2d 640 (1959), *cert.* den. 361 U.S. 836 (1959).

After the January 20, 1958 decision of this Court, Cities resumed payments for gas purchased from Petitioners at the contract prices instead of the State-ordered minimum price, and made demand upon Petitioners for repayment of the differences between the contract prices and the amounts actually paid for gas at the 11¢ price fixed in the void Kansas minimum price order. Petitioners refused to make any refunds and Cities brought the actions below to recover such differences.

The theory of Cities' cases as set forth in each complaint filed in the Superior Court of Delaware is rooted in common law principles (Pan American Appendix pp. 7a, 20a). Cities seeks recovery on the following grounds:

(1) That Petitioner, Pan American, expressly agreed to refund the overpayments by its letter to Cities of January 27, 1954; that payments to all Petitioners, including Pan American, pursuant to the letters of January 21, 1954 and the receipt and retention of such monthly payments constituted contracts by Petitioners to refund the overpayments sought to be recovered; and that those letters ripened into contracts when this Court held the Kansas price order void.

(2) Alternately, as particularly set forth in the Complaints, Cities seeks restitution of the amounts paid in excess of the contract prices, which payments were made involuntarily to avoid the criminal sanctions provided by law for violation of the Kansas minimum price order.

At no place in Cities' complaints is any reference made to, or reliance placed upon, the Natural Gas Act or any orders, rules or regulations issued thereunder or any action taken pursuant thereto. Any questions relating to such matters came into the case as defenses set up by Petitioners in their Answers (Pan American Appendix pp. 6a-7a, 20a).

Texaco and Columbian filed Motions for Summary Judgment[2] in the Delaware Superior Court. In their reply briefs on the Motions, they raised for the first time the contention that Section 22 of the Natural Gas Act precluded the Delaware State courts from entertaining the instant causes of action (Pan American Appendix pp. 5a-6a). The Superior Court held that Petitioners' contention that it lacked jurisdiction "to be without merit." It agreed with Cities that the "actions here asserted are based on contracts and/or restitution and not on the Natural Gas Act * * *" (Pan American Appendix p. 7a).

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[2] Upon the alleged grounds that: (1) From January 1, 1954 to July 16, 1954 (date of issuance of F.P.C. Order No. 174) the only lawful price was that set forth in the Kansas order; (2) After July 16, 1954, (the date of the aforementioned Order 174) the only lawful price was that on file with the F.P.C. (contending such price was the 11¢ Kansas-ordered minimum price); or (3) if the Kansas order was ineffective during the period from January 1, 1954 to July 16, 1954, or if the defendant had no rate on file with the F.P.C., the only lawful price would have been that prescribed by the Natural Gas Act (15 U.S.C. §§ 717 *et seq.*), and Cities does not base its claim upon that Act. (Pan American Appendix pp. 4a-5a).

Thereafter, Texaco and Columbian, joined by Pan American,[3] applied to the Supreme Court of Delaware for a Writ of Prohibition. The Writ was denied by a unanimous Court (Pan American Appendix pp. 16a-30a).

ARGUMENT

I.

The Petitions Raise Questions Which Have Been Settled by This Court

Cities, as previously stated, seeks recovery of payments made in excess of the contract prices, relying solely on common law grounds of breach of contract and restitution. Petitioners contend that Cities' right to recovery is barred by reason of the fact that the Commission accepted for filing as Petitioners' rate schedules the documents previously mentioned, including the 11-cent Kansas minimum price order. Petitioners look upon such acceptance as setting aside the contract prices, and fixing as the legally effective price the 11-cent price contained in the void Kansas minimum price order.

Thus, here is a case where Petitioners contend, by way of defense to the suits, that without a hearing and without any notice to Cities, the Commission set aside the contract price and fixed a price of 11 cents by merely sending Petitioners a letter notifying them that the Commission had accepted the void Kansas minimum price order for filing as part of their rate schedules. The defense, we submit, borders on the frivolous. This is particularly so in view of the aforementioned letter of January 21, 1954 sent by Cities to each Peti-

[3] Pan American also filed a Motion for Summary Judgment. Its Motion has not yet been disposed of by the Superior Court.

tioner, and in view of the fact that the Commission has made it clear that its letters accepting rate schedules for filing did not involve a "substantive" determination but was only "procedural" in nature. Re, *Cities Service Gas Company*, 12 P.U.R. 3d, pp. 3, 11.[4] Additionally, the Commission has taken the position that "since the Kansas order has been declared invalid on the date of its filing, it was never a part of the filed rate, and Cities Service is not barred by the filed 11¢ rate from recovering any payments made by it in excess of the contract price" (Pan American Appendix 14a-15a).[5] Indeed, the fact that the Commission, subsequent to the filing of the Kansas minimum price order pursuant to Order 174, ordered Cities to make the refunds mentioned above from monies recovered as a result of the instant litigation, is a clear recognition by the Commission that the Cities' actions here involved are not inconsistent with the rate schedules accepted by the Commission for filing (15 F.P.C. 1448, 1453-1458).

The very question raised by Petitioners' defense has been passed upon by two United States Courts of Appeal. Both courts have held that the filing of the void minimum price order was a nullity, and that the legally

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[4] The Commission there said:

> "Acceptance of a rate schedule for filing does not involve a determination by the commission of a substantive nature, nor does it indicate approval of the level or form of the rates set forth, or of the conditions of service. Such acceptance is a procedural matter wherein the person or company involved is informed that the rate schedule filed satisfies the formal requirements of §§ 154.92(b) and 154.93 of the commission's regulations."

[5] See *Cities Service Gas Co.* v. *Federal Power Commission*, 255 F. 2d 860, 862, 864 (10th Cir., 1958), *cert. den.* 358 U.S. 837 (1958).

effective rate accepted by the Commission was the rate fixed in the valid and binding contract between the parties. *Natural Gas Pipeline Company of America* v. *Federal Power Commission*, 253 F. 2d 3 (3rd Cir., 1958), *cert. den.* 356 U.S. 957 (1958); *Cities Service Gas Company* v. *Federal Power Commission*, 255 F. 2d 860 (10th Cir., 1958), *cert. den.* 358 U.S. 837 (1958); See also, *Phillips Petroleum Co.* v. *Federal Power Commission*, 258 F. 2d 906 (10th Cir., 1958); *Kerr-McGee Oil Industries* v. *Federal Power Commission*, 260 F. 2d 602 (10th Cir., 1958).

Petitioners' contention that the unilateral filing of the void Kansas minimum price order, as part of their rate schedules, established the 11-cent minimum price as the legally effective price, is a bald attempt to breathe life back into the Kansas minimum price order. Such contention makes a mockery of this Court's decision striking down that order. This is all the more so in the light of *Natural Gas Pipeline Company of America* v. *Federal Power Commission, supra,* where the Court unequivocally held, in cognate circumstances involving the Oklahoma minimum price order, that (253 F. 2d at p. 7):

> "* * * When the United States Supreme Court found Oklahoma's action to have been unlawful and set the State Commission order aside, there was no longer even the semblance of a valid law, or lawful order which could modify the contract rate. The contract rate, therefore, under the mandate of the Supreme Court must be held to have been the rate effective on June 7, 1954."

So, too, upon the striking down of the Kansas order here involved, the Court in *Cities Service Gas Company* v. *Federal Power Commission*, supra, spoke with equal force and clarity (253 F. 2d at p. 865):

> "* * * When the United States Supreme Court struck down the Kansas order there was no longer a valid order which could modify the contract rate, and the contract rate was the rate effective on June 7, 1954."[6]

Moreover, as will be demonstrated below, Petitioners' defense flies squarely in the teeth of this Court's decision in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1955), wherein it was held that initial rates filed with the Commission are those agreed to by contract; that the Commission cannot initially fix a rate different than that agreed to by the parties, but can only review the rate and modify it after a hearing and finding of unlawfulness. Thus, this Court stated (350 U.S. at p. 344):

> "Our conclusion that the Natural Gas Act does not empower natural gas companies unilaterally to change their contracts fully promotes the purposes of the Act. By preserving the integrity of contracts, it permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry. * * *"

A. It Is Well Settled That State Courts Have Jurisdiction to Determine Federal Questions Injected Defensively

Apart from the foregoing, however, Petitioners are patently in error in contending that the Supreme Court of Delaware erred in holding that the lower Delaware court has jurisdiction to determine the validity of the defense raised by them as to the legally-effective rate.

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[6] When Petitioners filed the Kansas minimum price order as part of their rate schedules, it was presumptively valid, and the Commission could do nothing else but accept it for filing. Such presumption was dispelled *ab initio* when this Court struck down the order. See *Cities Service Gas Company* v. *Federal Power Commission*, *supra*, fn. at p. 862.

That state courts have jurisdiction to determine federal questions injected defensively is too well settled to require extensive documentation. *Pratt* v. *Paris Gaslight & Coke Co.*, 168 U.S. 255 (1897); *New Marshall Engine Co.* v. *Marshall Engine Co.*, 223 U.S. 473 (1912); *State of Arkansas* v. *Kansas & Texas Coal Co.*, 183 U.S. 185 (1901). Equally well settled is the rule that a State court, in resolving a federal question such as the construction of a federal tariff, can look to the rules and decisions of a federal administrative agency. *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U.S. 285 (1922).

Contrary to Petitioners' contentions, the resolution of such federal questions by State courts will not destroy uniformity in the construction of the Natural Gas Act. Substantially the same contention was rejected by this Court in the *Great Northern* decision, wherein this Court stated (at 259 U.S. 290-1):

> "The contention that courts are without jurisdiction of cases involving a disputed question of construction of an interstate tariff, unless there has been a preliminary resort to the Commission for its decision, rests in the main, upon the following argument: The purpose of the Act to Regulate Commerce (Comp. St. § 8563 et seq.) is to secure and preserve uniformity. Hence, the carrier is required to file tariffs establishing uniform rates and charges, and is prohibited from exacting or accepting any payment not set forth in the tariff. Uniformity is impossible, if the several courts, state or federal, are permitted, in case of disputed construction, to determine what the rate or charge is which the tariff prescribes. To insure uniformity the true construction must, in case of dispute, be determined by the Commission.

"This argument is unsound. It is true that uniformity is the paramount purpose of the Commerce Act. But it is not true that uniformity in construction of a tariff can be attained only through a preliminary resort to the Commission to settle the construction in dispute. Every question of the construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff it is one of federal law. If the parties properly preserve their rights, a construction given by any court, whether it be federal or state, may ultimately be reviewed by this court either on writ of error or on writ of certiorari; and thereby uniformity in construction may be secured. * * *"

B. Petitioners' Reasons for Granting a Writ Are Predicated on Distortions of the Delaware Opinion

Underlying Petitioners' arguments in support of a writ is the assumption of the answer to the very question which they have brought in issue by way of defense below. If this assumption is removed, all of Petitioners' arguments fall like a house of cards.

Thus, Petitioners erroneously assume that the Commission's acceptance for filing of the Kansas minimum price order established a legally effective rate of 11 cents. They then argue that the decision of the Supreme Court of Delaware permits Cities to collaterally attack that Commission action, which action they claim became final because Cities did not protest such acceptance. They further argue that, contrary to *Montana-Dakota*,[7] the Supreme Court of Delaware held that the lower Delaware court can change the legally effective rate on file with the Commission (Pan American Pet. p. 11 *et seq*; Columbian Pet. p. 7 *et seq*; Texaco Pet. p. 8 *et seq*).

[7] *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951).

The decision of the Supreme Court of Delaware does none of these things. In the first place, the very question brought in issue by Petitioners' defense is the significance that should be attached to the Commission's acceptance, as part of Petitioners' rate schedules, of the Kansas minimum price order. Petitioners claim that such acceptance established a legally effective rate of 11 cents. Cities, on the other hand, contends that the Commission did, in fact, and, could only accept the valid and binding contractual arrangement between the parties. The Supreme Court of Delaware simply held that the lower Delaware court can determine what was the legally effective rate in passing upon the merits of Petitioners' defense. (Pan American Appendix, p. 25a).

By relying on *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co., supra,* Petitioners imply that there is an issue here involving the reasonableness of rates on file with the Commission, or that an attempt is being made to have the Delaware court change the legally effective rate on file with the Commission. There is no issue in this case as to the reasonableness of rates on file with the Commission; nor has any attempt been made to change legally effective rates.

Petitioners' defense raised an issue as to whether Cities' claim for recovery on common law grounds is inconsistent with the legally effective rate on file with the Commission. As previously stated, the decision of the Supreme Court of Delaware simply holds that the lower Delaware court is competent to interpret the rate schedule, the Commission's rules and the federal law in order to resolve this purely legal question injected defensively by Petitioners. *Great Northern Ry. Co.* v. *Merchants' Elevator Co., supra.*

In *Montana-Dakota, supra,* plaintiff sought to attack in a federal district court the reasonableness of a rate on file with the Commission. That case simply holds that a court, *be it state or federal,* has no authority to declare a rate unreasonable and that the Commission has exclusive jurisdiction to make such determination. The case is completely inapposite, for the purpose relied on by Petitioners, since there is no such issue in this case.

II.

Petitioners' Contention That the State Court Lacks Jurisdiction Because of Section 22 of the Natural Gas Act Is Without Merit

The basic question presented below[8] (but now deemphasized in the Petitions for Certiorari) was whether the Superior Court of Delaware is deprived of jurisdiction to entertain common law actions founded in contracts and restitution simply because those contracts were filed with the Federal Power Commission as rate schedules. Relying on Section 22 of the Natural

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[8] The Petitions for Certiorari, like Petitioners' brief in the Court below, contain an intermixture of arguments on the merits and on the narrow jurisdictional question presented by the request for a Writ of Prohibition. While we are of the view that the arguments on the merits are not germane to the basic issue of State court jurisdiction, we have, out of an abundance of caution, met those arguments in the preceding section of this Brief in Opposition. The intermixture of argument by Petitioners prompted the Court below to observe (Pan American Appendix, p. 30a):

> "A great deal of argument in the defendants' briefs [Petitioners here] is directed to an attempted limitation of the issues before the Superior Court and the issues before this Court. Most of this argument seems to us to miss the point. The substantial question which emerges, in one form or another, is whether the state courts have jurisdiction to entertain the suits on the refund contracts."

Gas Act, Petitioners contended that federal courts have exclusive jurisdiction to entertain such actions. (Pan American Appendix, pp. 6a, 40a, 41a; See Columbian Petition, p. 9). This contention was properly rejected by the Supreme Court of Delaware.

Section 22 of the Natural Gas Act (15 U.S.C., § 717u) provides, in pertinent part, as follows:

> "Sec. 22. The District Courts of the United States, the District Court of the United States for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law, *brought to enforce any liability or duty created by,* or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder * * *" (Emphasis supplied).

Petitioners contend, in essence, that once contracts are filed with the Federal Power Commission as rate schedules, all common law rights thereunder, as such, are abrogated and such rights become part of the federal law. While conceding that Cities' causes of action were "grounded solely on common law bases,"[9] they argued that the only cause of action Cities has is one to enforce a liability or duty created by the Act, which must be brought in Federal courts (Pan American Appendix p. 43a; Petitioners' Main Brief in Support of Writ of Prohibition).

In rejecting this argument, the Court below relied on the "authoritatively settled" proposition that the Nat-

[9] Petitioners' Main Brief in Support of Writ of Prohibition, p. 12.

ural Gas Act, as such, evinced no purpose to abrogate common law contract rights (Pan American Appendix, pp. 22a-23a). *United Gas Pipe Line Company* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 338 (1955). See also, *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1955); *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 142 F. 2d 943, 954 (10th Cir., 1944). It necessarily and unavoidably follows from the *Mobile* decision that if the Act preserves the "integrity of contracts" such as those here involved, and if the right to enter into such contracts remains unaffected by the Act, the right to bring common law actions stemming from such contracts likewise remains "unaffected" by the Act.

As noted by the Supreme Court of Delaware, its conclusion that the Delaware State court has jurisdiction over the actions involved was fortified by the fact that three unsuccessful attempts had been made to remove state court actions involving substantially identical facts to the federal courts for reasons substantially identical to those pressed by Petitioners. In each of those cases, the courts held that the claims were not founded upon federal law, but, on the contrary, were founded on contracts deriving their force from state law (Pan American Appendix, pp. 25a-26a). *Cities Service Gas Co.* v. *Skelly Oil Co.*, 165 F. Supp. 31 (D.C. Del. 1958); *Northern Natural Gas Co.* v. *Cities Service Oil Co.*, 182 F. Supp. 155 (D.C. Iowa, 1959); *Pan American Petroleum Corporation* v. *Cities Service Gas Co.* (D.C. Kansas, 1959, unreported; reprinted in Appendix A hereto). In the *Pan American* case, the Court, having before it the identical contracts here in question in Case No. 914, held:

> "The Natural Gas Act imposes certain duties upon the plaintiff as an independent producer. It must file its rate schedules with the Federal Power Commission and conform with its procedures. But the source of the right of action of the plaintiff is the contract; or, in the alternative, the conduct of the defendant in modifying the contract which conduct estops it from asserting its rights under the original agreement."[10]

Moreover, as noted by the Court below, its conclusions are further supported by the fact that an action for breach of contract or restitution, on substantially identical facts, was sustained in *Natural Gas Pipeline Co.* v. *Harrington,* 246 F. 2d 915 (5th Cir. 1957), *cert. den.* 356 U.S. 957 (1958) where jurisdictional grounds of diversity of citizenship existed. That Court did not hold that liability in such suit was created by the Act. On the contrary, it clearly recognized the action as founded on common law principles.[11] (Pan American Appendix, p. 27a).

While this Court has not had occasion to pass specifically on Section 22 of the Natural Gas Act,[12] there have been numerous decisions by this Court construing similar provisions in other federal Acts which clearly

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[10] In that case, Pan American contends that Cities, by its conduct, modified the original contract.

[11] We know of no case, and Petitioners cite none, where an action for overpayments of a contract price has been brought in the federal courts on the theory that such action enforced liabilities or duties created by the Act. In this regard, it should be noted that all of the federal cases listed in Appendix J to Pan American's Petition, involve diversity of citizenship.

[12] This is apparently the Delaware Supreme Court's reason for feeling that these cases may be appropriate ones for granting certiorari. (Pan American Appendix, pp. 25a, 33a).

support the Supreme Court of Delaware's conclusions. See, for example, *Montana-Dakota, supra,* 341 U.S. at pp. 250, 257, 259, where the Court construed Section 317 of the Federal Power Act, which is identical, in all material respects, to Section 22 of the Natural Gas Act.

The federal district courts are given exclusive jurisdiction of any civil action arising under any Act of Congress relating to patents, copyrights and trade marks (28 U.S.C. § 1338). Nevertheless, actions to enforce contracts in which the subject is a patent must be brought in State courts in the absence of diversity of citizenship. *Henry* v. *A. B. Dick Co.,* 224 U.S. 1, 14-15 (1912).[13]

The key to the rule is the distinction between a *case* arising under the federal laws and a *question* arising under those laws. *Pratt* v. *Paris Gas Light and Coke Co.,* 168 U.S. 255 (1897). If the plaintiff founds his suit directly on a breach of some right created by the federal laws, he makes a case arising under those laws and only a federal court has jurisdiction; but if, as here, he founds his suit on some right vested in him by the common law, or general equity jurisprudence, he makes a case arising under state law and only a state court has jurisdiction. "* * * This is the universal rule." *A & C Engineering Co.* v. *Atherholt,* 355 Mich. 677, 95 N.W. 2d 871 (1959). See discussion in 167 A.L.R. 1114.

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[13] Anti-trust law questions have been construed as vesting exclusive jurisdiction in the Federal courts. See *Blumenstock Bros. Advertising Agency* v. *Curtis Publishing Co.,* 252 U.S. 436, 440 (1920). Nevertheless, the defense of illegality under those laws may be adjudicated by a State court in an action for breach of contract. *E Remont & Sons* v. *National Harrow Co.,* 186 U.S. 70 (1902).

The rule was applied by this Court in considering rights under gas purchase contracts in *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667 (1950), wherein this Court stated (at p. 672):

> "If Phillips sought damages from petitioners or specific performance of their contracts, it could not bring suit in a United States District Court on the theory that it was asserting a federal right. And for the simple reason that such a suit would 'arise' under the State law governing the contracts."

In like manner, Mr. Chief Justice Vinson, dissenting in part, stated (339 U.S. 670):

> "I concur in that part of the Court's judgment that directs dismissal of the cause as to Skelly and Stanolind. I have real doubts as to whether there is a federal question here at all, even though interpretation of the contract between private parties requires an interpretation of a federal statute and the action of a federal regulatory body [the Federal Power Commission]."

See also *Gully* v. *First National Bank*, 299 U.S. 109, 115, 118 (1936).

It is apparent from the above, as well as the plain language of Section 22 of the Natural Gas Act, that that Section is limited solely to causes of action seeking to enforce some liability or duty *created* by the Act. Cities' complaints, as we stated previously and as Petitioners concede, are grounded solely on common law bases. At no place in Cities' complaints is any reference made to, or reliance placed on, the Natural Gas Act or any orders, rules or regulations issued thereunder or any action taken pursuant thereto. Any questions relating to such matters came into the case

as defenses set up by Petitioners in their Answers. But, as shown above, such defenses do not oust State courts of their jurisdiction.

The foregoing, we respectfully submit, makes clear that Section 22 does not oust State courts of jurisdiction to entertain the instant suits. The rights upon which the instant suits are predicated are rights which clearly arise out of common law. Those rights existed prior to the Natural Gas Act and persist to this day, subject only to the power of the Commission to alter such rights in accordance with the Natural Gas Act. *Mobile* case, *supra*. We suggest that the test as to whether the right to bring the instant actions was created by the Natural Gas Act is to determine whether the right to maintain the action would have existed in the absence of the Act. And obviously, such right would have existed in the absence of the Natural Gas Act.[14] Stated differently, it was not the filing of the contracts with the Federal Power Commission which gave the contracts validity, or which created a right to sue for breach thereof. The filing of the contracts was merely for the purpose of notice and to permit the Commission to exercise its review function. *Mobile* made that abundantly clear.

It seems crystal clear to us that since the Act did not abrogate private rate contracts, and since natural gas companies are free, as before the Act, to set rates initially by such contracts, it is frivolous as well as tortured reasoning to contend, as do Petitioners, that

[14] Cf. *Montana-Dakota* case, *supra*, 341 U.S. at pp. 250, 257, 259.

rights are not created by such contracts, but are created by an Act which did not abrogate such contracts.[15]

The decision below simply holds that the State courts of Delaware have jurisdiction to entertain common law causes of action; and that the State courts can look to federal law to determine federal questions injected defensively and incidental to the main causes of action. We respectfully submit that the decision below presents no new or novel questions of law. On the contrary, the decision is predicated on well-settled principles of law enunciated by this Court, and follows a series of recent federal court cases uniform in their holdings on the various subsidiary matters raised by Petitioners.

All of Petitioners' arguments have a hollow ring, indeed, when viewed in the light of Cities' letter of January 21, 1954; this Court's decision striking down the Oklahoma and Kansas minimum price orders; the aforementioned Federal Power Commission's order (15 F.P.C. 1448, 1454-6) requiring refunds by Cities; the respective decisions of the Third and Tenth Circuit Courts of Appeals in the *Natural Gas Pipeline Company* and *Cities Service* cases, *supra*, holding the filing of the Oklahoma and Kansas minimum price orders to be a nullity; and the decisions of the federal district courts in the *Skelly, Northern* and *Pan American* cases, *supra*, on facts substantially identical to those here involved, holding that State Courts have jurisdiction.

[15] A statute will not be construed as taking away a common law right existing at the date of its enactment unless such a result is imperatively required. *Texas and Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907); *Federal Power Commission v. Sierra Pacific Power Co.*, *supra*.

CONCLUSION

The judgment of the Supreme Court of Delaware is clearly correct and in accord with the determinations and applicable decisions of this Court. The petitions for a writ of certiorari, accordingly, should be denied.

Respectfully submitted,

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May 31, 1960

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS.

CIVIL ACTION NO. W-1595.

PAN AMERICAN PETROLEUM CORPORATION, *Plaintiff*,

v.

CITIES SERVICE GAS COMPANY, *Defendant*.

Memorandum Opinion

This is an action for a declaratory judgment instituted by the plaintiff, Pan American Petroleum Corporation, against the defendant, Cities Service Gas Company. The suit was originally filed in the District Court of Seward County, Kansas for the purpose of securing a declaratory judgment under *Kan. G. S.* 1949, 60-3127 to 60-3132(c), inclusive. On June 25, 1958, the defendant removed the suit to this court under the authority of 28 USC § 1441(b), basing the removal on the ground that the action was one in which the federal courts have original jurisdiction in that it is founded on the Natural Gas Act, 15 USC § 717, a claim or right arising under an Act of Congress regulating commerce. Under 28 USC § 1337, the jurisdiction of this court was invoked by the defendant. The plaintiff filed its motion to remand. This is the motion at bar. Since both parties are Delaware corporations, federal jurisdiction on the basis of diversity is absent. The sole question presented is whether the plaintiff's petition discloses upon its face a controversy between the parties with reference to a right or immunity created by the laws of the United States.

Initially, what may this court consider in determining this issue? The applicable principles of law in deciding the removability of civil actions have been clearly stated, both by the Supreme Court and the Court of Appeals of this circuit. In *Gully* v. *First National Bank*, 299 U. S. 109, 112 (1936), the court stated the following tests to be applied

in determining when a case arises "under the Constitution or laws of the United States:"

> "To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. . . . The right of immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. . . . A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto . . . and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal. . . . Indeed, the complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense . . . ."

Accord, *Anderson* v. *Bingham & G. Ry. Co.*, 169 F. 2d 328, 330 (10th Cir. 1948); *Regents of New Mexico College of Agriculture & Mechanics Arts* v. *Albuquerque Broadcasting Co.*, 158 F. 2d 900, 907 (10th Cir. 1947).

These tests of federal jurisdiction for cases arising under the laws of the United States have been enumerated in the following fashion: (1) it should be kept in mind that the federal courts are courts of limited jurisdiction; (2) the right claimed must be one which will succeed on one construction of the laws of the United States but will fail on another; (3) there must be a necessity for construction of a federal statute or statutes and a real and genuine dispute or controversy between the parties as to the meaning and effect of a federal law asserted to be involved; (4) the asserted federal question must be real, substantial, and meritorious, not frivolous or a well-settled question foreclosed by previous court decisions; (5) the right itself must

be federal in its nature and not merely in its source or origin; (6) presentation of a federal question must be determined from the plaintiff's own statement of his cause of action, of which the claimed federal right must be an essential element; and (7) matters pleaded by the plaintiff in anticipation or avoidance of defenses, or matters appearing in such pleadings subsequent to plaintiff's complaint as defendant's answer or petition for removal, are entirely immaterial and cannot be considered in determining whether a federal question is presented. Annotation, What actions arise under the laws and treaties of the United States so as to vest jurisdiction of Federal Courts, 14 A. L. R. 2d 992, 1002-1003 (1950). In order to decide the issue presented, it is clear that we must analyze the contents of the plaintiff's petition alone, unaided by any matters pleaded in anticipation or avoidance of defenses to be alleged by the defendant.

From the petition, it appears that the plaintiff is an independent producer of oil and gas owning oil and gas leases in the Hugoton Field in southwestern Kansas. The defendant is in the business of transporting and selling natural gas for resale for ultimate consumption. On June 23, 1950, these parties entered into a twenty year gas sales contract for the purchase and sale of natural gas. The contract price for the gas was 8.4 cents per Mcf measured at 16.4 pounds per square inch absolute (psia) at a temperature of 60° fahrenheit. The contract provided that it was subject to all valid laws and lawful orders of all regulatory bodies having jurisdcition of the parties.

Subsequently, the State Corporation Commission of Kansas prescribed a minimum wellhead price of 11¢ per Mcf measured at 14.65 psia at 60° fahrenheit, which order became effective on January 1, 1954. On July 16, 1954, the Federal Power Commission required all independent producers, including the plaintiff, to file with the Commission rate schedules. On November 16, 1954, the plaintiff filed its schedules setting out the 11¢ per Mcf price as estab-

lished by the Corporation Commission of the State of Kansas. And on March 2, 1955, the Federal Power Commission accepted the filed rate price effective June 7, 1954. To these orders, the plaintiff did not object, nor did it invoke section 19(b) of the Natural Gas Act to prevent the 11¢ rate from becoming effective. In fact, it paid the new price without protest.

On March 22, 1954, the defendant filed its request for increased rates on gas sold by it to ultimate consumers. In support of these increased rates, it relied upon the 11¢ per Mcf price. The increased rates were allowed by the Federal Power Commission. Then on July 1, 1957, the plaintiff filed with the Federal Power Commission a notice that effective that date, the applicable price would be 11.0715¢ per Mcf. This was in conformity with the tax reimbursement clause of the Kansas severance tax act. To this increase, the defendant not only did not object, but requested as it secured a tax advantage. For all gas delivered from July 1, to November 23, 1957, the defendant paid the sum of 11.0715¢ per Mcf. But once the severance tax law was declared unconstitutional, the plaintiff no longer paid this .0715¢ increase.

As aforementioned, the defendant paid the sum of 11¢ per Mcf from January 1, 1954, to November 23, 1957, without protest. On November 24, 1957, the defendant tendered to the plaintiff the original 8.4¢ per Mcf rate, and on January 28, 1958, the defendant demanded payment from the plaintiff for the difference between the payments the defendant had made to the plaintiff and the payments which it should have made for such gas under the new contract rate.

During this period, the plaintiff assigned some of the leases subject to the original contract to 125 persons and transferred the proceeds of the gas sales to such assignees which was accomplished with full knowledge of the defendant. The plaintiff relied on the 11¢ price, drilled new wells

and reworked others. As a result of these acts, agreements, and conduct, the plaintiff contends that the contract was modified with the defendant's acquiescence and is estopped to deny that the contract was modified. These are the facts, circumstances, and contentions as disclosed by the plaintiff's petition.

Section 1441(b) authorized the removal to the United States Court of any civil action of which the district court has original jurisdiction founded on a claim or right arising under the laws of the United States. Section 1337 provides that the district courts shall have original jurisdiction of any civil action arising under any Act of Congress regulating commerce or protecting trade or commerce. And Section 1331 gives federal courts original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum of $3,000, exclusive of interest and costs, and arises under the laws of the United States. Admittedly, the jurisdictional amount is present, and the Natural Gas Act is a law of Congress regulating Commerce. 15 USC § 717. The Act regulates the transportation, sale and distribution of natural gas in interstate commerce. If the petition discloses a case or controversy arising under the Natural Gas Act, which is an essential element of the plaintiff's cause of action, and that the plaintiff's right will be supported if the Natural Gas Act is given one construction and defeated if it is given another, then the case was properly removed. If not, then the plaintiff's motion to remand should be sustained.

In the event that the case presents a close question as to whether the federal court has jurisdiction, what test should be applied in deciding whether to retain the suit, or remand it to the state court. Some courts have held that on a motion to remand, every doubt should be resolved against remand. *Bon* v. *Midwest Refining Co.*, 30 F. 2d 410, 413 (D. Wyo. 1929); *affirmed*, 43 F. 2d 23 (10th Cir. 1930). Cf. *Bradley* v. *Halliburton Oil Well Cementing Co.*,

100 F. Supp. 913, 916 (W. D. Okla. 1951). Other federal courts have held that all doubts are to be resolved against the removal of the cause. *Kansas* v. *Bradley*, 26 Fed. 289 (D. Kan. 1885); *Winsor* v. *United Air Lines*, 159 F. Supp. 856 (D. Del. 198); *Aetna Ins. Co.* v. *City of Malben*, 102 F. Supp. 126 (E. D. Mo. 1952); *John Hancock Mutual Life Ins. Co.* v. *United Office & Professional Workers of America*, 93 F. Supp. 296 (D. N. J. 1950). This rule is based on the presumption against jurisdiction as the powers of the federal courts are of a limited nature. Such being the case, the jurisdiction of federal courts is to be strictly construed. *Shamrock Oil & Gas Co.* v. *Sheets*, 313 U.S. 100, 108 (1941); *Healy* v. *Ratta*, 292 U. S. 263, 270 (1934).

Another rule was formulated in *Boatmen's Bank of St. Louis* v. *Fritzlen*, 135 Fed. 650, 655 (8th Cir. 1905), which case originated in this district. With respect to the applicable test to apply in determining whether the federal court had jurisdiction of a removal suit, the court stated:

> ". . . the true rule is that motions to remand and for removal should be decided, not by the existence of doubts, but by the preponderance of the facts, the law, and the reasons which condition them, in view of the fact that the right to invoke the jurisdiction of the federal court is a valuable constitutional right, and an erroneous affirmance of the claim to that right may be corrected by the Supreme Court upon a certificate of the question of jurisdiction, while an erroneous denial of the claim is remediless."

See *Chicago, R. I. & Pacific Rd. Co.* v. *Kay*, 107 F. Supp. 895, 906 (W. D. Iowa 1952); *Cyclopedia of Federal Procedure*, Vol. 2, § 3.135, pp. 398-399 (3rd Ed. 1951). Before the application of the test to be used in deciding whether this court has jurisdiction of this removal proceeding, let us examine the nature of the present action.

The original contract entered into between the parties for the sale and purchase of dry natural gas was executed in this state and was to be performed here. This court must apply the substantive law of state in which it sits. *Erie* v. *Tompkins*, 304 U. S. 64 (1938). The Kansas Supreme Court has twice construed this agreement to be a Kansas contract. See *Stanolind Oil & Gas Co.* v. *Cities Service Gas Co.*, 181 Kan. 526, 313 P. 2d 279 (1957); *Stanolind Oil & Gas Co.* v. *Cities Service Gas Co.*, 178 Kan. 202, 284 P. 2d 608 (1955).

But the original agreement is not the source of the instant controversy. The question centers on the 11¢ modification entered by the State Corporation and filed with the Federal Power Commission by the plaintiff—all without objection from the defendant. First with respect to the 11¢ order entered by the Kansas Corporation Commission, it is clear that under the Natural Gas Act, the states have no power to regulate the sale of natural gas in interstate commerce by independent natural gas producers. *Cities Service Gas Co.* v. *State Corporation Commission of Kansas*, 355 U. S. 391 (1958); *Natural Gas Pipeline Co.* v. *Panoma Corporation*, 349 U. S. 44 (1955); *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672 (1954). By the very terms of the contract, the Kansas Corporation Commission, as a regulatory body having no jurisdiction over the parties, did not have the power to modify the terms of the original agreement. In itself, the State Corporation Commission order was ineffectual.

Also; the filing of a unilateral contract change with the Federal Power Commission is not sufficient to change Pan American's contract with Cities Service. This was settled by the Supreme Court in *United Gas Pipe Line Co.* v. *Mobile Gas Corporation*, 350 U. S. 332 (1956). If the contract in question was a "going" rate agreement, then the Federal Power Commission could change the price as the parties would have so agreed by contract. *United Gas Pipe Line Company* v. *Memphis Gas, Light and Water*

Division, 358 U. S. — (1958). But the contract in question is not of such a nature. It is one of a fixed price as was construed in the *Mobile* decision. The Commission has the power under Section 5(a) of the Natural Gas Act to change the contract rate upon finding that the contract rate is unreasonable or unjust so that it would have an adverse effect on the public interest. *Federal Power Commission* v. *Sierra Pacific Power Company*, 350 U. S. 348, 353 (1956). No such action was taken by the Commission in the present case.

In view of these decisions, it is clear that there is no federal question presented relative to the order of the Kansas Corporation Commission raising the contract price to 11¢, and the unilateral rate change by the Federal Power Commission. Since the law is settled, there is no federal question. This rule was aptly stated in *Regents of New Mexico* v. *Albuquerque Broadcasting Co.*, 158 F. 2d 900, 907 (10th Cir. 1947), in which the court noted:

> "It is well settled that the lack of substantiality in a federal question may appear, either because it is obviously without merit, or because its unsoundness so clearly results from previous decisions of the Supreme Court as to foreclose the subject, or, as it is sometimes stated, there must be a Federal question, not in mere form but in substance, and not in mere assertion but in essence and effect. The reason is plain. If the asserted Federal right is clearly and obviously without merit, the case cannot possibly arise under Federal law."

To escape the effect of this rule, the defendant contends that this court has original jurisdiction since the question presented is whether the 8.4¢ contract rate or 11¢ "tariff" rate as scheduled with the Commission is the effective rate. The argument is predicated on the theory that the rate filed is to be treated as though it were a statute binding

upon the parties before the court, and as such a tariff, the construction of its effect presents a federal question. In support of this contention, the defendant cites *Bernstein Bros. Pipe & Machinery Co.* v. *Denver & Rio Grande W. Rd. Co.*, 193 F. 2d 441 (10th Cir. 1951). The question involved in that decision was whether one tariff rate or another applied to the transportation of portable heating units. With respect to the proper rate to be charged, the Court noted:

> "The amount of a transportation charge for goods shipped in interstate commerce is not a matter of private contract between the parties. The shipper and carrier are alike bound by the established and published tariff rates. . . . No contract of the carrier can reduce the amount legally payable or release from liability, a shipper who has assumed an obligation to pay the charges. Nor will any act or omission of the carrier estop or preclude it from enforcing payment of the full amount under the tariff by a person liable therefor."

Under the Interstate Commerce Act, there is but one rate; and no room for private contracts. Is the Natural Gas Act of the same nature? In *United Gas Pipe Line Co.* v. *Mobile Gas Corporation*, 350 U. S. 332 (1956), the sole question presented was whether under the Natural Gas Act a regulated gas company furnishing gas to a distributing company could change the contract rate simply by filing a new rate schedule with the Federal Power Commission, when objected to by the distributing company. Initially, the court noted the difference between the Natural Gas Act and the Interstate Commerce Act, by stating:

> "In construing the Act, we should bear in mind that it evinces no purpose to abrogate private rate contracts as such. To the contrary, by requiring contracts to be filed with the Commission, the Act expressly recognizes that rates to particular customers may be set by

individual contracts. In this respect, the Act is in marked contrast to the Interstate Commerce Act, which in effect precludes private rate agreements by its requirement that the rate to all shippers be uniform, a requirement which made unnecessary any provision for filing contracts."

Then the court held that one party could not unilaterally change the terms of the original contract by filing a "rate schedule" under Section 4(d). The only effect of the Act is "a prohibition, not a grant of power.". Section 4(d) "says only that a change *cannot* be made without the proper notice to the Commission; it does not say under what circumstances a change *can* be made."

The precise question is whether the original contract was modified. This alleged modification occurred as a result of circumstances which were independent of the provisions of the Natural Gas Act. These circumstances are questions of fact to be determined in order to declare what the present contract is. As stated by the Supreme Court in the *Mobile* case, ". . . the Act provides no 'procedure' either for making or changing rates; it provides only for *notice* to the Commission of rates established by natural gas companies and for *review* by the Commission of those rates. The initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act."

The case of *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U. S. 667 (1950), sheds some light on the issue herein presented. The Supreme Court in reversing the lower court held, that the attempted injection of a federal question as to the Natural Gas Act was merely an anticipatory defense and did not constitute an essential element of the plaintiff's cause of action. Federal jurisdiction was denied. In so holding, the court stated:

> "If Phillips sought damages from petitioners or specific performance of their contracts, it could not bring suit in a United States District Court on the theory that it was asserting a federal right. And for the simple reason that such a suit would arise under the State law governing contracts."

In addition to the fact that the plaintiffs' cause of action was based on a contract, the court noted that since the trend was towards the contraction of the jurisdiction of the federal courts in cases "arising under . . . the Laws of the United States," the case should not be considered as one arising under federal law. In support of this statement, the court said:

> "With exceptions not now relevant Congress has narrowed the opportunities for entrance into federal courts, and this Court has been more careful than in earlier days in enforcing these jurisdictional limitations."

In this case, the defendant makes the same contentions as were made by the plaintiffs in the *Phillips* case, i.e., that the regulations promulgated by the Commission under the Natural Gas Act had the force and effect of federal law. The Supreme Court rejected this argument. Likewise, in the instant case, it is so rejected.

The Natural Gas Act imposes certain duties upon the plaintiff as an independent producer. It must file its rate schedules with the Federal Power Commission and conform with its procedures. But the source of the right of action of the plaintiff is the contract; or in the alternative, the conduct of the defendant in modifying the contract which conduct estops it from asserting its rights under the original agreement. See *Anderson* v. *Bingham & Garfield Ry. Co.*, 169 F. 2d 328 (10th Cir. 1948); 14 ALR 2d 992 (1950).

Assuming that a contract may be modified through spe-

cific conduct or acquiescence, the defendant contends that the question of estoppel is in itself a federal question under the regulations of the Natural Gas Act, and its provisions under which they are issued. In support of this argument, it cites *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173 (1942). It is true that the Court in the *Sola* case found the "doctrine of estoppel" to constitute a federal question as it was "in conflict with the Sherman Act's prohibition of price-fixing." The rationale of that opinion was that there can be no valid estoppel to deny the validity of a patent if the estoppel would result in a contravention of federal anti-trust laws. The court concluded its opinion with the statement that "rules of estoppel which would fasten on the public as well as the petitioner the burden of an agreement in violation of the Sherman Act must yield to the Act's declaration that such agreements are unlawful, and to the public policy of the Act which in the public interest precludes the enforcement of such unlawful agreements." As the Sherman Anti-Trust Act renders unlawful all agreements and private contracts which in any way, unreasonably restrain competition in interstate commerce, such contracts are in violation of federal law. Therefore, the formation of such agreements through the application of the doctrine of estoppel presents a federal question.

If the rate schedule filed in the present suit was analogous to the Interstate Commerce Act, then Cities Service's contention is proper. See *United States* v. *Western Pacific Rd. Co.*, 352 U. S. 59, 76 (1956). But in the construction of rate schedules filed with the Federal Power Commission, under the Natural Gas Act, this is not so. The act specifically provides for the approval of private contracts, which rates, by their very origin, will vary. There is no published rate, or tariff. The only issue is whether the original contract, or a new agreement created through conduct and acquiescence, is in effect. The doctrine of estoppel in no fashion precludes the effectiveness of any federal statute.

The only limitation on the right of the parties to contract for the purchase and sale of natural gas is Section (5)(a) which allows the Federal Power Commission to declare such contracts unjust and unreasonable if violative of public interest. There is no such element in the present case. The sole question is whether the parties are bound by the terms of the original agreement, or have by their conduct modified the first agreement, are operating under the modified contract.

A suit to enforce the terms of a contract, as allegedly modified by the acts and conduct of the parties, is not one arising under the laws of the United States within the meaning of the jurisdictional statutes. Where it appears from the complaint that the plaintiff does not assert a claim or right arising out of federal law, that the alleged federal claim is not an essential element of the plaintiff's cause of action, that the federal law allegedly involved is merely colorable, and that it is immaterial as to the effect of the construction of the Natural Gas Act upon such claim, the suit is not one arising under the laws of the United States.

The allegations of the petition charging the defendant with the modification of the contract merely tenders an issue of fact whether the agreement has been so modified. The petition did not present any issue or controversy in respect to the validity, construction, or effect of the Natural Gas Act. It did not set forth any right or immunity which would be supported if the Act be given one construction or effect and defeated if given another. The right or immunity upon which the suit is predicated is the right of the parties to contract with each other. This is not a federal right.

In conclusion, from an examination of the plaintiff's petition, unaided by the petition for removal or matters pleaded in anticipation or avoidance of defenses, it appears that the right upon which the cause of action is founded is not federal in nature, but is grounded on the premise

of the formation of a modified contract through the acts, conduct and acquiescence of the parties in this action. This right, or cause of action, will neither succeed or fail on the construction of a federal statute, or regulation promulgated pursuant to such statute. Despite the existence of such federal statutes, the suit is based on the theory that a new agreement has been entered into by the parties.

In view of the foregoing this case be, and it hereby is remanded to the District Court of Seward County, Kansas, the defendant to pay all of the costs incurred in this court by reason of removal.

(Signed) DELMAS C. HILL,
Chief Judge.

U. S. DISTRICT COURT
DISTRICT OF KANSAS } *ss.:*

I hereby certify that the foregoing is a true copy of the original on file in this court and cause.

HARRY M. W..SHINGTON,
Clerk.

By /s/ EUGENIA RUDY,
Deputy.

Dated 12/31/58.